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In the Supreme Court of the United States

OCTOBER TERM, 1986

CONSTABLE WALTER H. RANKIN, ET AL., PETITIONERS

v.

ARDITH MCPHERSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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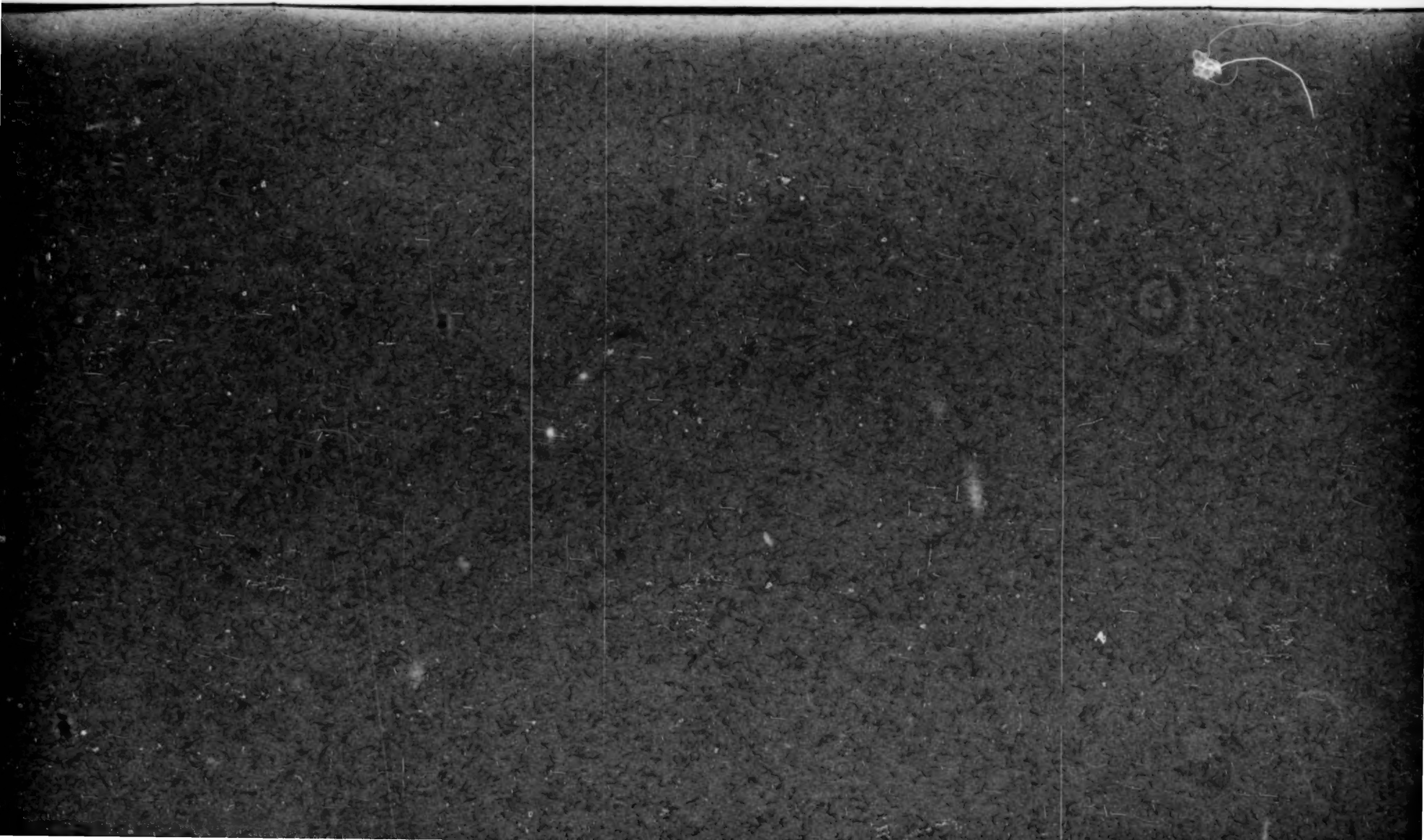

QUESTION PRESENTED

Whether the free speech components of the First and Fourteenth Amendments preclude a public law enforcement agency from discharging an employee for expressing approval of, and a genuine desire for, the assassination of the President of the United States.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	7
Argument:	
The court of appeals erred in holding that the First and Fourteenth Amendments preclude a public law enforcement agency from discharging an employee for expressing her unflinching approval of and desire for the assassination of the President of the United States	9
A. Expression that approves of and genuinely desires the assassination of the President cannot fairly be characterized as speech on a matter of public concern	12
B. Even if respondent's expression could be regarded as speech on a matter of public concern, her discharge was nevertheless justified by legitimate countervailing interests of the law enforcement agency for which she worked	19
Conclusion	29

TABLE OF AUTHORITIES

Cases:

Adler v. *Board of Education*, 342 U.S. 485 (1952) 9
Arnett v. *Kennedy*, 416 U.S. 134 (1974) 20, 21, 22, 27
Beauharnais v. *Illinois*, 434 U.S. 250 (1952) 12
Bose Corp. v. *Consumers Union of Unites States, Inc.*, 466 U.S. 485 (1984) 19
Cafeteria Workers v. *McElroy*, 367 U.S. 886 (1961) 10
Cantwell v. *Connecticut*, 310 U.S. 296 (1940) 17
Carey v. *Brown*, 447 U.S. 455 (1980) 15
Chaplinsky v. *New Hampshire*, 315 U.S. 568 (1942) 12, 17
Civil Service Commission v. *Letter Carriers*, 413 U.S. 548 (1973) 21, 22, 27
Cohen v. *California*, 403 U.S. 15 (1971) 17, 18, 27
Cole v. *Richardson*, 405 U.S. 676 (1972) 22
Connick v. *Myers*, 461 U.S. 138 (1983) ..... *passim*
Cramp v. *Board of Pub. Instruction*, 368 U.S. 278 (1961) 22
Dun & Bradstreet, Inc. v. *Greenmoss Builders, Inc.*, No. 83-18 (June 26, 1985) 13, 14, 15, 16, 18

Page

Cases – Continued:

First Nat'l Bank v. *Bellotti*, 435 U.S. 765 (1978) 12, 17
Frohwerk v. *United States*, 249 U.S. 204 (1919) 16
Garner v. *Los Angeles Board*, 341 U.S. 716 (1951) 9
Garrison v. *Louisiana*, 379 U.S. 64 (1964) 13, 16
Gasparinetti v. *Kerr*, 568 F.2d 311 (3d Cir. 1977), cert. denied, 436 U.S. 903 (1978) 21
Givhan v. *Western Line Consolidated School District*, 439 U.S. 410 (1979) 18, 24, 25
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 17
Janusaitis v. *Middlebury Volunteer Fire Dep't*, 607 F.2d 17 (2d Cir. 1979) 21
Keyishian v. *Board of Regents*, 385 U.S. 589 (1967) 10, 22
McAuliffe v. *Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892) 10
NAACP v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) 12
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 14
New York v. *Ferber*, 458 U.S. 747 (1982) 12
Ohralik v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978) 19, 25
Olmstead v. *United States*, 277 U.S. 438 (1928) 23
Philadelphia Newspapers, Inc. v. *Hepps*, No. 84-1491 (Apr. 21, 1986) 13
Pickering v. *Board of Education*, 391 U.S. 563 (1968) ... 10, 13, 16, 18, 20, 21, 25
Roth v. *United States*, 354 U.S. 476 (1957) 12, 16
Snepp v. *United States*, 444 U.S. 507 (1980) 21, 22
Virginia Pharmacy Bd. v. *Virginia Consumer Council*, 425 U.S. 748 (1976) 12, 14
Watts v. *United States*, 394 U.S. 705 (1969) 17, 19
Wieman v. *Updegraff*, 344 U.S. 183 (1952) 10, 22
Yoggerst v. *Hedges*, 739 F.2d 293 (7th Cir. 1984) 16-17

Constitution, statutes, and regulation:

U.S. Const.:
Amend. I ..... *passim*
Amend. XIV 4, 10, 11

Page

Constitution, statutes, and regulation—Continued:

Lloyd-LaFollette Act, 5 U.S.C. 7501 21
18 U.S.C. 871(a) 3, 16, 19, 26
42 U.S.C. 1983 4
5 C.F.R. 735.201a 21-22

Miscellaneous:

Developments in the Law, Public Employment, 97 Harv. L. Rev. 1611 (1981) 22

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INTEREST OF THE UNITED STATES

This case presents the question whether a public law enforcement agency may discharge an employee for speaking out in favor of violent criminal acts. The United States is the Nation's largest public employer, and the Justice Department is the Nation's largest law enforcement agency. Because the Court's resolution of the question presented will apply to the federal government, the United States has a substantial interest in the outcome of this case.

STATEMENT

1. Petitioner Walter Rankin is the Constable for Precinct One in Harris County, Texas. He was first elected to that position in 1965 on the Democratic Party ticket (Pet. App. 36a; J.A. 55, 57, 63, 75). As Constable for Precinct One, petitioner is responsible for monitoring and serving process in all civil and criminal misdemeanor cases in Harris County (Pet. App. 37a; J.A. 60-61). He is also responsible for serving process on and occasionally arresting juveniles; for executing warrants on persons being

involuntarily committed to mental health institutions; and for providing transportation and security to visiting dignitaries and government officials (Pet. App. 37a; J.A. 61-64, 67-70, 90-93). Petitioner deems himself authorized to carry out any law enforcement function necessary to aid the citizenry that elected him (J.A. 62, 70).

Petitioner employs approximately 80 persons to assist him with his duties (Pet. App. 36a). Some of these persons have been commissioned as "peace officers" pursuant to a statewide procedure (J.A. 70-72). As peace officers, they may assist petitioner in serving process, executing warrants, and providing security to visiting officials (Pet. App. 37a). Others have not been commissioned as peace officers and may perform only clerical functions for petitioner (*ibid.*). Under Texas law, however, all of petitioner's employees, regardless of job function, are designated as Deputy Constables and must take the prescribed oath of office (*id.* at 6a). As a Deputy Constable, each employee is authorized to act as petitioner's "true and lawful deputy, to do and perform any and all acts and things pertaining to the office of said Constable" (*id.* at 5a).

Petitioner appointed respondent Ardith McPherson as a Deputy Constable on January 14, 1981, for a 90-day probationary term (Pet. App. 4a). Since respondent was not a commissioned peace officer (*id.* at 37a), she was assigned to operate a computer terminal in the office, where she monitored the progress of civil summonses issued in the precinct (*id.* at 4a-6a). As part of this job, respondent occasionally had to answer the telephone and to respond to information requests of attorneys visiting the office (*id.* at 13a n.1; J.A. 78-79).

On March 30, 1981, respondent and several other Deputy Constables were working at their computer terminals when they heard that the President had been shot (Pet. App. 24a). This report prompted respondent to

engage a co-worker in a brief discussion of the President's economic and social policies, with which respondent strongly disagreed (*id.* at 6a, 13a, 40a). Respondent concluded this discussion by stating that the assassination attempt had to "happen sooner or later" (Jan. 21, 1985 Tr. 73) and that, "[i]f they go for him again, I hope they get him" (Pet. App. 23a, 32a).

A senior Deputy Constable employed by petitioner overheard respondent's remark (Pet. App. 30a). Already stunned by the news of the assassination attempt (Jan. 21, 1985 Tr. 54), the senior Deputy Constable said to respondent, "[S]urely you don't mean that" (*id.* at 56). Respondent made no effort to disarm the senior Deputy Constable's concern (*id.* at 56, 75, 93; J.A. 80). As a consequence, the senior Deputy Constable reported the incident to his superior, who in turn reported the incident to petitioner (Pet. App. 6a, 32a; J.A. 79-82).

Petitioner immediately summoned respondent to his office (Pet. App. 6a, 32a; J.A. 82). There, he asked respondent whether she had expressed her approval of and desire for the assassination of the President (Pet. App. 6a-7a). Respondent confirmed that she had done so (*ibid.*; J.A. 82-83). Petitioner then asked respondent whether she "meant" what she said (Pet. App. 7a, 14a n.3). Respondent replied, "I sure do" (*id.* at 7a, 32a; J.A. 82-84). Petitioner promptly "lost all confidence" that respondent was fit to be a Deputy Constable in his law enforcement agency and discharged her (Pet. App. 7a, 24a-25a; J.A. 83, 103). Respondent at the time was still a probationary employee, having been on the job only ten weeks and having two weeks of her probationary period left (Pet. App. 4a, 13a n.1).

Petitioner reported to the Secret Service the fact that respondent had indicated she would approve of the assassination of the President. Pet. App. 24a-25a; J.A. 83-84. See 18 U.S.C. 871(a) (making certain threats on the

President's life a crime). In accord with its customary policy, the Secret Service sent two agents to respondent's house to investigate the incident (Jan. 21, 1985 Tr. 80). The agents asked respondent to provide them with handwriting samples and permission to verify that she had never been committed to a mental health institution (*id.* at 81). Respondent cooperated with the agents and they did not contact her again (*id.* at 81-82).

2. Respondent subsequently filed this 42 U.S.C. 1983 action against the Constable and Harris County in United States District Court, alleging that her discharge violated the free speech components of the First and Fourteenth Amendments (Pet. App. 32a; J.A. 9-10). The court granted summary judgment in favor of petitioners. It first found that respondent's "comment in no way served the public's interest in matters of general concern" (Pet. App. 10a). It then found that the "Constable's office maintains a strong interest in retaining only those deputies who possess and publicly manifest qualities of character that accentuate the high standards of the field of law enforcement" (*id.* at 11a). The court concluded that "[i]t was not unreasonable for Constable Rankin to lose confidence in the ability of one who would make such a statement as [respondent's], at the time and place it was made, to project a suitable image for law enforcement personnel or to make consistently appropriate law enforcement decisions" (*ibid.*). Thus, it held that respondent's "First Amendment rights were not violated by her discharge" (*ibid.*).

The court of appeals vacated and remanded for further factual findings (Pet. App. 12a-30a). It found that substantial issues of material fact remained concerning the " 'content, form, and context' " of respondent's expression (*id.* at 17a, quoting *Connick* v. *Myers*, 461 U.S. 138, 147-148 (1983)). The court concluded that these factual uncertainties made the grant of summary judgment to petitioners improper (Pet. App. 20a). In particular, the

court emphasized that the district court should determine "whether [respondent] admitted to the Constable that she seriously meant what she said rather than spoke in political hyperbole" (*ibid.* (footnote omitted)).

3. After conducting a full trial on remand (Pet. App. 21a-27a), the district court held that respondent's remark was "something more than political hyperbole" (*id.* at 25a). Noting that respondent had "conceded having said those words * * * and [having] made no attempt to retract them," the court found that respondent's words "expressed such dislike of a high public government official as to be violent words, in context" (*id.* at 23a, 25a). The court then reaffirmed its earlier determinations that "Constable Rankin [was] very concerned about the character and trustworthiness of the people in his office, as he is certainly entitled to be" (*id.* at 25a), and that respondent's statement had "indicate[d] to him [that] she was the kind of person who would be a * * * negative influence in the office" (*ibid.*). The court further noted that the Constable "does * * * a great deal of work with the public [such that] [i]f the people he hires mistreat the public, disappoint the public, [or] insult the public, [he] is not going to get reelected" (*ibid.*). Employing a "balancing test" derived from this Court's decisions, the court then determined that "Constable Rankin's right to promote the efficiency of the public service through his employees" outweighed respondent's right "to say, if they go for him again, I hope they get him" (*id.* at 26a).

4. The court of appeals reversed (Pet. App. 29a-42a). It found that "the record supports the district court's conclusion that [respondent] expressed an actual wish for the assassination of the President" (*id.* at 39a) and that she was not discharged merely "for expressing disapproval of the President's policies" (*id.* at 36a & n.1). Although the court viewed respondent's statement as "repulsive, nigh obscene," it found that she had not been fired "solely for the disgusting manner of her expression" (*id.* at 35a).

Rather, it concluded that she "was undoubtedly fired because of the *content* of her speech," that is, "because she honestly hoped that any future assassination attempt would be successful" (*id.* at 36a (emphasis in original)). On that basis, the court held that respondent's remark deserved the highest degree of First Amendment protection because "it was evoked by and addressed to serious matters of public concern," to wit, "the life and death of the President" (*id.* at 40a, 36a).

Applying this Court's decision in *Connick* v. *Myers*, 461 U.S. 137 (1983), the court of appeals then undertook to balance "the value of protecting [respondent's] right to express her opinion, however loathsome, * * * against the competing interests of the constable's office in the effective and efficient fulfillment of its law enforcement responsibilities" (Pet. App. 40a). The court agreed that "Constable Rankin's action in dismissing [respondent] was based on an important and legitimate government interest" (*id.* at 40a-41a), specifically, "that a law enforcement agency cannot be expected to carry out its mission through officers who favor political assassination" (*ibid.*). It found, however, that respondent's "potential for undermining the office's mission [was] trivial" (*id.* at 42a). The court noted that respondent "was one of about dozen clerk-typists working in a closed room" (*ibid.*), that "[s]he was not a law enforcement officer and she had none of the discretion or power associated with that position" (*ibid.*), that "[h]er job did not bring her into contact with the public" (*ibid.*), and that she did not have "any access to sensitive or important files" (*ibid.*). "Were any of these factors different," the court said, "we would have a different case." But since there was no "evidence that [this] government employee's views [were] inconsistent with the mission of the employing agency *and* with the employee's role in that agency (*ibid.* (emphasis in original)), the court held that "tolerance [was] required."

SUMMARY OF ARGUMENT

The court of appeals erred in holding that the free speech components of the First and Fourteenth Amendments of the Constitution preclude this public law enforcement agency from discharging respondent for expressing her unflinching approval of and unabashed desire for the assassination of the President of the United States. That holding rests on the false premise that respondent's expression relates to a "matter of public concern." And even if that premise were accepted, respondent's discharge was justified by the Constable's substantial interest in not employing persons who express their approval of acts that would constitute major violations of the criminal law.

A. Under this Court's precedent, the free speech components of the First and Fourteenth Amendments limit the conditions a public employer may place on its employees' expressive activities only to the extent that those employees, by their expressive activities, are addressing a "matter of public concern." Expressive activity does not address a "matter of public concern," however, unless, when viewed in terms of its "content, form, and context," it contributes to a dialogue in which the body politic has a rational and legitimate reason to engage. Respondent's remark concerning her approval of and unabashed desire for the assassination of the President does not contribute to any such dialogue. In terms of its "content," the remark expresses only respondent's personal and private desire that the President be removed from office by assassination; assassination is, however, a serious crime and a fundamentally intolerable means of promoting political change in our democratic order. Approval of such a serious crime is not a position which should be regarded as a matter within the range of publicly debatable propositions. In terms of "form," the remark is much like those forms of expression, such as fighting words and incitement to riot, that this Court has held are not worthy of

First Amendment protection at all. Finally, in terms of "context," respondent did not make her remark as part of any serious effort to participate in public dialogue; rather, it was an unprofessional statement made in office conversation and in a subsequent dispute with her employer. Accordingly, while we do not think that respondent's remark could be criminalized, we believe that it stands in the lower tier of First Amendment values. Respondent therefore is not entitled to resist her discharge from public employment by invoking the First Amendment.

B. In any event, even if respondent's remark were thought to relate to a "matter of public concern," the Constable was justified in discharging respondent for expressing it. A public employer may protect substantial governmental interests by placing reasonable conditions on its employees' right to engage in expressive activities, even when those expressive activities address matters of public concern. A law enforcement agency has a substantial interest in employing only those persons who possess and publicly manifest qualities that exemplify respect for law and for the high standards of law enforcement. Petitioner's refusal to employ a person who openly expressed her approval of and desire for the assassination of the President of the United States is a reasonable means of promoting that governmental interest. By making and refusing to retract a statement that she would approve of a violent criminal act, respondent gave the Constable substantial reason to believe that she did not possess the qualities that he properly desired his Deputy Constables to manifest. That respondent made her remark during office hours and while on probationary status gave the Constable additional reason to conclude that she would be a negative influence on the agency's reputation and efficiency. The Constable was, therefore, entitled to discharge her for making her statement, notwithstanding whatever First Amendment value that statement might have.

The ministerial nature of respondent's duties does not render the Constable's judgment unreasonable. Public confidence in the agency's dedication to its mission, as well as the agency's need to foster proper attitudes among its employees, requires that the prohibition against unprofessional behavior—and, specifically, the prohibition against open approval of serious violations of the criminal law—be imposed on employees at all levels, regardless of job function. The "appearance" of governmental integrity and commitment to official duty would be greatly endangered if a public employer, especially a law enforcement agency, could not hold its employees, regardless of level, to minimal standards of professionalism, which include, of course, a requirement that employees refrain from expressing approval of serious violations of the law that the agency is charged with enforcing. In any event, the Constable had authorized respondent to act in his "place and stead" and would be deemed to have ratified all of her comments and actions during work hours; in these circumstances, respondent should be held to the same standards to which the Constable himself is held. The court of appeals' contrary judgment is erroneous.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT THE FIRST AND FOURTEENTH AMENDMENTS PRECLUDE A PUBLIC LAW ENFORCEMENT AGENCY FROM DISCHARGING AN EMPLOYEE FOR EXPRESSING HER UNFLINCHING APPROVAL OF AND DESIRE FOR THE ASSASSINATION OF THE PRESIDENT OF THE UNITED STATES

For many years, this Court held that public employers could require their employees to waive their constitutional rights, including their rights of free speech, as a condition of employment. See, *e.g.*, *Adler* v. *Board of Education*, 342 U.S. 485 (1952); *Garner* v. *Los Angeles Board*, 341 U.S. 716 (1951). The classic formulation of

this position was that of Justice Holmes, who observed that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). More recently, however, the Court has determined that, in some circumtances, it is unreasonable for public employers to require their employees to waive their free speech rights as a condition of employment. See, *e.g.*, *Wieman* v. *Updegraff*, 344 U.S. 183 (1952); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886 (1961); *Keyishian* v. *Board of Regents*, 358 U.S. 589 (1967). Under these decisions, the free speech components of the First and Fourteenth Amendments require the judiciary "to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968).

In *Connick* v. *Myers*, 461 U.S. 138 (1983), the Court made clear that judicial superintendence of public employers' personnel decisions has specific limits. The Court there concluded that, if an employee's expression "cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for [the courts] to scrutinize the reasons for [the] discharge" (*id.* at 146 (footnote omitted)). The Court in *Connick* emphasized "that government offices could not function if every employment decision became a constitutional matter" (*id.* at 143), and that ordinary dismissals from government service are not subject to judicial review merely because the employer's reasons "are alleged to be mistaken or unreasonable" (*id.* at 146-147). Accordingly, the Court held that, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials

should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment" (*id.* at 146). And where expressive activity does touch on a "matter of public concern," the Court stated, the constitutional balance "requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public" (*id.* at 150). The Constitution does not require a public employer to "tolerate action which [he] reasonably believe[s] would disrupt the office, undermine [his] authority, and destroy close working relationships" (*id.* at 154).

The decision below—that the First and Fourteenth Amendments preclude a public law enforcement agency from discharging an employee for expressing her unflinching approval of and desire for the assassination of the President—ignores the Court's admonitions in *Connick*. Respondent's expressive activity did not address a "matter of public concern" within the meaning of this Court's decisions. The employment-related sanction imposed by the Constable thus should not have been subjected to judicial review to begin with. And even if respondent's remark favoring the assassination of the President were deemed to address a "matter of public concern," the Constable nevertheless had a legitimate and substantial reason for discharging her. A public law enforcement agency has an overriding interest in employing only those persons who project a suitable image for law enforcement personnel, an image that is not conveyed by those who stubbornly profess genuine approval of violent criminal acts. The Constable's interest in maintaining the reputation and efficiency of his law enforcement agency clearly outweighs whatever First Amendment value attaches to respondent's tasteless and inane remark.

A. Expression That Approves Of And Genuinely Desires The Assassination Of The President Cannot Fairly Be Characterized As Speech On A Matter Of Public Concern

In *Connick* v. *Myers*, this Court observed that the district court had "got off on the wrong foot" by finding the subject of the employee's speech to be addressed to "matters of public importance and concern" (461 U.S. at 143). The court of appeals committed a similar misstep at the threshold here. It believed itself "required to engage in *Pickering/Connick* balancing" because of its assumption that, in the context of this case, "the life and death of the President are obviously matters of public concern" within the meaning of those decisions (Pet. App. 36a). That assumption is incorrect.

1. This Court has long recognized that not all expression is of equal value under the First Amendment. The Court has determined, for example, that some types of speech are not entitled to any First Amendment protection at all. See *New York* v. *Ferber*, 458 U.S. 747 (1982) (child pornography); *Roth* v *United States*, 354 U.S. 476 (1957) (obscenity); *Beauharnais* v. *Illinois*, 343 U.S. 250 (1952) (libelous speech); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942) (fighting words). It has held that other types of speech deserve only a reduced level of First Amendment protection. See *Connick* v. *Myers*, 461 U.S. at 148-149 (discussion of office morale and other internal office affairs); *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U.S. 748, 771-772 (1976) (commercial speech). Finally, it has held that still other types of speech are "at the heart of the First Amendment's protection" (*First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 776 (1978)), and occupy the "highest rung of the hierarchy of First Amendment values" (*NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)). These latter types of expression, the Court has said, are those that relate to "matter[s] of legitimate public concern." See *Connick* v. *Myers*,

461 U.S. at 145; *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, No. 83-18 (June 26, 1985), slip op. 7-11; *Philadelphia Newspapers, Inc.* v. *Hepps*, No. 84-1491 (Apr. 21, 1986), slip op. 10-11.

The Court in *Connick* reviewed its prior "public concern" cases and found them inspired by a common principle. In each instance, the "content, form, and context of a given statement, as revealed by the whole record," showed that the speech at issue contributed to the " 'free and open debate [that] is vital to informed decisionmaking by the electorate' " (461 U.S. at 147-148, 145, quoting *Pickering* v. *Board of Education*, 391 U.S. at 571-572)). " '[S]peech concerning public affairs,' " the Court stated, " 'is more than self-expression; it is the essence of self-government' " (461 U.S. at 145, quoting *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964)).

The *Connick* case involved an employee who was discharged for circulating to her fellow employees a questionnaire concerning internal office affairs with which she was unhappy. One question in that questionnaire asked whether her co-workers felt pressured to work in political campaigns. As to this question, the Court found that her expression related to "a matter of interest to the community," reasoning that "official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights" (461 U.S. at 149). The other questions in the questionnaire, however, pertained to "the confidence and trust that [her] co-workers possess[ed] in various supervisors, the level of office morale, and the need for a grievance committee" (*id.* at 148). These questions, the Court determined, were of no "public import in evaluating the performance of the [employer] as an elected official" (*ibid.*), "did not seek to inform the public that the [employer] was not discharging its governmental responsibilities" (*ibid.*), and did not "seek

to bring to light actual or potential wrongdoing or breach of public trust on the part of [the employer] and others" (*ibid.*). The Court acknowledged that the questionnaire's "subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest" (*id.* at 148 n.8). On the record before it, however, the Court held that these questions related to internal office affairs and not to "matters of public concern."

Two Terms later, in *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, No. 83-18 (June 26, 1985), the Court examined the First Amendment implications of expression wholly unrelated to internal office affairs and found that it too did not involve a "matter of public concern." The question there was whether certain reports of a credit reporting agency were entitled to the highest level of protection available under the First Amendment. Applying the "content, form, and context" analysis set forth in *Connick*, five Justices agreed that the credit reports did not relate to "matters of public concern" and, accordingly, did not lie at the core of the First Amendment. See *Dun & Bradstreet*, slip op. 12-13 (plurality opinion); slip op. 2 (opinion of Burger, C.J.); slip op. 10-11 (opinion of White, J.). As Justice Powell explained for the plurality, the credit reports were "speech solely in the individual interest of the speaker and its specific business audience" (slip op. 12). The reports' limited circulation demonstrated that they did not implicate society's " 'strong interest in the free flow of * * * information' " (*ibid.*, quoting *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U.S. 748, 764 (1976)), and ' "there [was] simply no credible argument that this type of credit report require[d] special protection to ensure that 'debate on public issues [will] be uninhibited, robust, and wide-open' " (slip op. 12-13, quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964)).

2. We think that *Connick* and *Dun & Bradstreet* compel a quite different conclusion concerning the First Amendment implications of respondent's expression than was reached by the court of appeals. For when one examines the "content, form, and context" of respondent's remark, it is clear that her speech did not address any "matter of legitimate public concern," at least not within the meaning of this Court's decisions.

Respondent's remark favoring the President's assassination did not, as the court of appeals suggested (Pet. App. 36a), speak to a matter of public concern simply because it dealt with the "life and death of the President." To be sure, the subject of presidential assassination *in general* raises many questions of interest to historians, contemporary commentators, and the public, and many of these questions may provoke thought and debate that lie at the core of the First Amendment. The public is rightly interested in the facts surrounding an assassination attempt, the state of the President's health, the adequacy of presidential security, and the steps that the government is taking to deal with the crisis. These and other aspects of an attempted assassination are "matters of public concern" that relate to the "essence of self-government." But respondent's remark favoring the President's assassination was none of these. Rather, it expressed only a personal and individuated desire that the President's life be brought to a violent end. In our view, a venting of spleen like this cannot seriously be thought to "rest[ ] on the highest rung of the heirarchy of First Amendment values." *Carey* v. *Brown*, 447 U.S. 455, 467 (1980).

The intellectual discourse of our democratic body politic is in no way advanced by the expression of sentiments like those respondent uttered. Our society has never considered assassination of public officials to be a viable or tolerable means of "bringing about * * * political and social changes desired by the people"

(*Roth* v. *United States*, 354 U.S. 476, 484 (1957)), and has never treated expression favoring assassination as an instance of rational or legitimate debate. See *Frohwerk* v. *United States*, 249 U.S. 204, 206 (1919) ("We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder * * * would be an unconstitutional interference with free speech."). See also 18 U.S.C. 871(a) (making certain threats on the life of the President a criminal offense). Accordingly, respondent's statement cannot properly be said to be protected on the theory that it addresses "a matter of legitimate public concern." *Pickering* v. *Board of Education*, 391 U.S. at 571-572; *Connick* v. *Myers*, 461 U.S. at 145.

This common-sense conclusion is fortified by the "content, form, and context" analysis that this Court employed in *Dun & Bradstreet* and *Connick*. In terms of "content," respondent's remark is much like the credit reports at issue in the former case and the discussion of internal office affairs at issue in the latter. Discussion favoring the assassination of the President has no potential for assisting the public "in evaluating the performance of the [President] as an elected official" (*Connick*, 461 U.S. at 148). Nor will it add to the public's cognitive understanding of how the President is performing his constitutionally mandated duties, or "bring to light any actual or potential wrongdoing or breach of trust" on the President's part (*ibid.*). "[I]f released to the public, [the remark] would convey no information at all" (*ibid.*), except, perhaps, that this individual would personally like to see the President violently removed from office. But speech of this type is "solely in the individual interest of the speaker and its specific * * * audience" (*Dun & Bradstreet*, slip op. 12 (plurality opinion)). The remark is in essence pure "self-expression," and not "speech concerning public affairs." *Garrison* v. *Louisiana*, 379 U.S. at 74-75. See *Yoggerst* v.

Hedges, 739 F.2d 293, 296-297 (7th Cir. 1984); see generally *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 785 (1978) (First Amendment principally concerned with "debatable public question[s]").

Nor, in our view, does the "form" of respondent's remark transform it into speech that addresses a "matter of public concern." In certain situations, this Court has held that the "emotive" aspect of a person's words may make them deserving of *some* First Amendment protection, at least to the point where the state may not criminalize the utterance. See *Cohen* v. *California*, 403 U.S. 15, 26 (1971) (expletive concerning the draft). On the other hand, this Court has also held, in other situations, that potential "emotive" effects are precisely the reason that certain expression should receive *no* First Amendent protection at all. See, *e.g.*, *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942) ("fighting words" are "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality"); *Cantwell* v. *Connecticut*, 310 U.S. 296, 309-310 (1940) ("Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution."). Expression approving of the assassination of American political officials has emotive implications that threaten the order of our democratic polity. See *Watts* v. *United States*, 394 U.S. 705, 707 (1969) (per curiam). Thus, we believe that such statements are not more than one step removed from those forms of expression—such as fighting words and incitement to riot—that this Court has held should receive no First Amendment protection whatsoever. See *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 591-592 (1952) (distinguishing for First Amendment purposes between expression "advocating change * * * by lawful elective processes and advocating change by force and violence"). While statements like respondent's may

not properly be criminalized, they clearly are not entitled to the special protection accorded political speech at the core of the First Amendment.

Finally, in terms of "context," respondent did not make her remark during a public rally or debate and in this respect the remark was like the employee's questionnaire in *Connick* and the credit agency's reports in *Dun & Bradstreet*. Respondent made her remark in casual office conversation with a fellow employee and then, when questioned further, reiterated it in a closed-door discussion with her employer. Compare *Pickering* v. *Board of Education*, 391 U.S. at 566 (letter written to a newspaper by a teacher in response to previously-published articles about schools). Thus, respondent's discussion with the Constable was separate from and no part of her expression of "disapproval of the President's policies" (Pet. App. 36a n.1); it was simply a crude and offensive remark made during private conversation while serving in a law enforcement office. Cf. *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979) (expression relates to "matter of public concern" when it focuses on school's allegedly racially discriminatory policies, even though made privately). In "context," therefore, it is clear that respondent was not speaking out upon a "matter of public concern," but rather was engaging in an "absurd and immature antic" (*Cohen* v. *California*, 403 U.S. at 27 (Blackmun, J., dissenting)). In such circumstances, "agonizing over First Amendment values seems misplaced and unnecessary" (*ibid.*).

3. In contending that respondent's speech does not touch upon "a matter of public concern," we do not suggest that her words are "totally beyond the protection of the First Amendment," or that they fall into "one of the narrow and well-defined classes of expression which carries so little social value * * * that the State can prohibit and punish such expression by all persons in its jurisdic-

tion" (*Connick* v. *Myers*, 461 U.S. at 147). As the court of appeals observed (Pet. App. 34a), "[a] state would * * * face considerable constitutional obstacles if it sought to criminalize the words that were uttered by [respondent] on the day the President was shot." Cf. *Watts* v. *United States*, 394 U.S. at 708 ("political hyperbole," amounting to an "offensive method of stating political opposition to the President," is not a criminal offense under 18 U.S.C. 871(a)). We do suggest, however, that respondent's expression of approval of and desire for the assassination of the President, judged by its "content, form, and context," occupies at best a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). From this premise, it necessarily follows that the employment-related sanction that respondent received cannot be challenged as a violation of her free speech rights under the First and Fourteenth Amendments. *Connick* v. *Myers*, 461 U.S. at 146, 148-149; see also *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 505 n.22 (1984). Such a conclusion will not "suppress the rights of public employees to participate in public affairs" (*Connick* v. *Myers*, 461 U.S. at 144-145). Rather, it will prevent disaffected public employees from resisting disciplinary action for unprofessional behavior by invoking "the name of the First Amendment" (*id.* at 146).

B. Even If Respondent's Expression Could Be Regarded As Speech On A Matter Of Public Concern, Her Discharge Was Nevertheless Justified By Legitimate Countervailing Interests Of The Law Enforcement Agency For Which She Worked

The conclusion that a public employee's expression is directed to "a matter of public concern" does not, standing alone, immunize that person from job-related sanctions. *Connick* v. *Myers*, 461 U.S. at 149-154. As this Court has

recognized, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering* v. *Board of Education*, 391 U.S. at 568. Thus, a public employer may restrict its employees' expressive activities if the governmental interest it seeks to promote outweighs the employees' First and Fourteenth Amendment entitlement. See *Connick* v. *Myers*, 461 U.S. at 149-150; *Pickering* v. *Board of Education*, 391 U.S. at 568. We think that a law enforcement agency's interest in not employing a person who, during office hours, expresses and stubbornly adheres to a desire that the President be assassinated clearly outweighs that individual's interest in expressing herself in that manner. Therefore, even if favoring the assassination of the President could properly be characterized as a topic of legitimate public debate, we would conclude that petitioner did not violate respondent's free speech rights by discharging her for making such a comment.

1. This Court has long recognized that "the government's interest in the effective and efficient fulfillment of its responsibilities to the public" is a substantial one (*Connick* v. *Myers*, 461 U.S. at 150). "[T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs" (*Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring)). "Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency" (*ibid.*). Thus, the government must have "the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch" (*ibid.*).

An employee may hinder the efficient operation of a public agency in several ways. Most obviously, an employee may engage in conduct or expression that impedes his own ability to perform the job responsibilities assigned to him. See *Pickering* v. *Board of Education*, 391 U.S. at 572-573. Likewise, an employee may engage in conduct or expression that impedes successful working relationships with fellow employees or supervisors. See *Connick* v. *Myers*, 461 U.S. at 151-153; *Janusaitis* v. *Middlebury Volunteer Fire Dep't*, 607 F.2d 17, 19 (2d Cir. 1979) ("an esprit de corps is essential" among firefighters). Finally, an employee may engage in conduct or expression that "interfere[s] with the regular operation" of the agency in general (*Pickering* v. *Board of Education*, 391 U.S. at 573), by damaging the public's confidence that the agency is committed to and capable of performing its designated function. See *Arnett* v. *Kennedy*, 416 U.S. at 162; *Gasparinetti* v. *Kerr*, 568 F.2d 311, 315-316 (3d Cir. 1977), cert. denied, 436 U.S. 903 (1978).

That a public employer has a substantial interest in keeping its employees from damaging the agency's public "appearance" and "reputation" has been recognized often by this Court. For example, in *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980), the Court held that the Central Intelligence Agency has a "compelling interest" in maintaining "the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." Similarly, in sustaining the Hatch Act against First Amendment challenge, the Court held that Congress has a substantial interest, not only in ensuring that federal service employees "in fact avoid practicing political justice," but also in ensuring "that they appear to the public to be avoiding it." *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 565 (1973). And in sustaining the Lloyd-LaFollette Act (5 U.S.C. 7501) against First Amendment challenge, the Court upheld a federal regulation (5 C.F.R.

735.201a(f)) providing that a civil servant may be removed for engaging in expressive activity that "[a]ffect[s] adversely the confidence of the public in the integrity of the Government." *Arnett* v. *Kennedy*, 416 U.S. 134, 141-142 (1974). In each of these cases, the Court recognized that the government has an overriding interest in regulating "employee behavior, including speech, which damages and impairs the reputation and efficiency of the employing agency." *Id.* at 162 (opinion of Rehnquist, J.)[1]

A law enforcement agency naturally has a strong and legitimate interest in maintaining the reputation and appearance of being fully committed to enforcement of the

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[1] The decisions of this Court invalidating government loyalty oaths are not to the contrary. "The issue [in those cases] was whether government employees could be prevented or 'chilled' by the fear of discharge from joining political parties and other associations that certain public officials might find 'subversive.' " *Connick* v. *Myers*, 461 U.S. at 144-145. The loyalty-oath cases therefore held that the government may not seek to preserve its reputation for integrity through mechanisms that, because of their vagueness or overbreadth, operate to impair the right of citizens to participate in political affairs. See, *e.g.*, *Weiman* v. *Updegraff*, 344 U.S. 183, 191 (1952) (overbreadth); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 604 (1967) (vagueness); *Cramp* v. *Board of Pub. Instruction*, 368 U.S. 278 (1961) (vagueness). On the other hand, where a restriction has been reasonably tailored in understandable language to accomplish its stated purpose, this Court has sustained prohibitions designed to preserve the government's appearance of integrity. See, *e.g.*, *Snepp* v. *United States*, 444 U.S. 507 (1980); *Arnett* v. *Kennedy*, 416 U.S. at 162 (opinion of Rehnquist, J.); accord, *id.* at 164 (opinion of Powell, J.); *id.* at 177 (opinion of White, J.); *Civil Service Commission* v. *Letter Carriers*, 413 U.S. at 565. Indeed, the Court has sustained properly tailored loyalty oaths against First Amendment challenge. See, *e.g.*, *Cole* v. *Richardson*, 405 U.S. 676, 681-684 (1972). See generally *Developments in the Law, Public Employment*, 97 Harv. L. Rev. 1611, 1751 (1984) (noting that the Court has "recognize[d] the importance of the state and public interest in loyal public servants").

law. It depends on the public for tips about criminal activity, for testimony in support of its enforcement actions, and, most importantly, for voluntary compliance with the letter of the law. To maintain this spirit of cooperation, a law enforcement agency may properly insist that its employees "possess and publicly manifest qualities of character that accentuate the high standards of the field of law enforcement" (Pet. App. 11a). For if the law enforcement agency and its employees do not take the law seriously, neither will the public on which the agency's effectiveness depends. See *Olmstead* v. *United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("For good or ill, [our Government] teaches the whole people by its example.").

For these reasons, the district court below correctly determined that respondent's remark—that she would approve of and, in fact, desire another attempt on the life of the President—was a source of legitimate concern to the Constable. The Constable runs a law enforcement agency.[2] He "does a great deal of work with the public" (Pet. App. 25a). People "would lose confidence in his officers and in him personally, and his credibility as a law enforcement officer would be destroyed," if he retained an

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[2] Although respondent apparently contends (Br. in Opp. 3) that the Constable's office is not really a "law enforcement office," the district court and the court of appeals rejected this argument. See Pet. App. 7a, 11a, 22a-26a, 33a, 40a. Their conclusions are firmly supported by evidence in the record. While the primary function of the Constable's office is to execute civil court service, juvenile court service, and mental health warrants (Br. in Opp. 3), the office is also responsible for arresting juveniles in criminal matters, serving process in criminal misdemeanor matters, and providing security for visiting dignitaries and high government officials. See J.A. 60-64, 67-70, 90-93. Furthermore, the Constable deems himself authorized by law to carry out any law enforcement function necessary to aid the citizenry that elected him. See J.A. 62, 70. Thus, while the law enforcement role of the Constable's office may be indirect in some respects, it is nonetheless significant.

employee who "espouse[d] the assassination of any president, judge, or other public official" (*id.* at 7a). Because respondent's comment was completely inconsistent with the public appearance and reputation that the Constable rightfully sought to project, he reasonably concluded "that an individual possessing an attitude such as [respondent's] is not a suitable employee of a law enforcement agency" (*ibid.*).

The time, place, and manner of respondent's expression plainly reinforced the reasonableness of the Constable's conclusion. See *Connick* v. *Myers,* 461 U.S. at 152-153 ("manner, time, and place" of expression relevant); *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 415 n.4 (1979) (same). Respondent made her remark to co-workers at the office during office hours. See *Connick* v. *Myers,* 461 U.S. at 153. She held a probationary appointment and had been in the Constable's employ for fewer than 90 days, so that he had every reason to expect that she would be on her best behavior. Yet she elected to express her approval of and desire for the President's assassination at a time when her fellow employees were still stunned that an attempt had been made on the President's life. Moreover, when questioned about her statement by the Constable, respondent dug in her heels and insisted that she "meant" what she said, thus verging on insubordination and convincing the Constable that she did not have the temperament necessary for public service. In these circumstances, "[i]t was not unreasonable for Constable Rankin to lose confidence in the ability of one who would make such a statement as [respondent's], at the time and place it was made, to project a suitable image for law enforcement personnel or to make consistently appropriate law enforcement job decisions" (Pet. App. 11a).

Against these legitimate government interests justifying the Constable's decision to fire respondent must be balanced her First Amendment interest in speaking the words

she spoke. See *Connick* v. *Myers*, 461 U.S. at 142; *Pickering* v. *Board of Education*, 391 U.S. at 568. We have argued above that respondent's remark should not be regarded as "commenting upon matters of public concern" (*ibid.*) and hence that it occupies at best a "subordinate position in the scale of First Amendment values" (*Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. at 456). If, contrary to our primary submission, respondent's remark is judged to address "a matter of public concern," we obviously believe that it can creep into that highest echelon of the First Amendment heirarchy by only the slimmest of possible margins. The court of appeals itself characterized respondent's speech as "loathsome," "repulsive," and "nigh obscene" (Pet. App. 35a, 40a). Her wish that the President be assassinated, therefore, is a far cry from the expression at issue in *Pickering*, where a public school teacher wrote to a newspaper criticizing the board of education's proposals for financing school construction. Likewise, respondent's remark is a far cry from the expression at issue in *Givhan*, where a teacher spoke to her principal about alleged racial discrimination in the public schools. And respondent's remark is a far cry from the expression at issue in *Connick*, where an assistant district attorney asked her co-workers whether they "ever [felt] pressure[ ] to work in political campaigns" (461 U.S. at 149). Although the *Connick* Court held that in this respect the questionnaire did "touch[ ] upon a matter of public concern," it nevertheless concluded, after examining "the nature of the employee's expression," that her free-speech interests were outweighed by "the government's interest in the effective and efficient fulfillment of its responsibilities to the public" (*id.* at 149, 150). Since the Constable's interest in effective and efficient law enforcement is at least as strong as the public employer's interest in *Connick*, and

since the nature of respondent's expression makes it far less deserving of First Amendment immunity, the propriety of her discharge follows a fortiori from the holding in that case.

2. The court of appeals agreed with much of the analysis that we have outlined here. It noted that "a government agency is entitled to employ only those individuals who have no serious reservations about [its] fundamental mission" and that "a law enforcement agency cannot be expected to carry out its mission through officers who favor political assassination" (Pet. App. 40a). The court therefore "agree[d] that Constable Rankin's action in dismissing [respondent] was based on an important and legitimate government interest" (*id.* at 40a-41a). The court concluded, however, that, because respondent had only "ministerial" duties, her "potential for undermining the office's mission [was] trivial" and, accordingly, that her First Amendment interest outweighed the Constable's interest in promoting the integrity and efficiency of his operations (*id.* at 42a). We believe this line of analysis to be misdirected, both as it applies to the facts of this case and on a level of more general principle.

Although respondent was a "clerk-typist" whose job seldom brought her into contact with the public, the risk that a person with her expressed beliefs would undermine the agency's reputation and appearance was nevertheless substantial. Respondent's remark had already become the subject of discussion within the office, as the reaction of the senior Deputy Constable shows. Moreover, because remarks concerning the assassination of the President are very serious matters (see 18 U.S.C. 871(a)), the Constable quite responsibly decided to report the incident to the Secret Service. In doing so, he had to place himself in the potentially embarrassing situation of having another agency of government investigate one of his employees for possible violations of the criminal law. Under this Court's precedent, the Constable did not have "to allow events to

unfold to the extent that the disruption of the office and the destruction of working relationships [were] manifest before taking action" (*Connick* v. *Myers*, 461 U.S. at 152). Rather, he was entitled to act on his quite "reasonable beli[ef] that [respondent's continued employment] would disrupt the office, undermine his authority, and destroy close working relationships" (*id.* at 154). The fact that respondent's duties were "ministerial" in no way undermines the legitimacy of the Constable's concerns.

Quite apart from the facts of this case, however, the court of appeals' theory—that the government's interest in prescribing minimum standards of acceptable speech and conduct for its employees varies with "the employee's role in [the] agency" (Pet. App. 42a)—strikes us as fundamentally wrong. The appearance of governmental integrity and commitment to official duty would be lost if every employee holding a "lowly job" (*ibid.*) were at liberty to undercut the message that the agency is responsible for sending to the public. Cf. *Arnett* v. *Kennedy*, *supra* (prohibition against engaging in activity that adversely affects the "integrity" of the government applicable to all individuals in the competitive service); *Civil Service Commission* v. *Letter Carriers*, *supra* (Hatch Act prohibitions applicable to most employees in the federal service). Speech advocating discrimination against minorities would be improper, in our view, for any employee of the Equal Employment Opportunity Commission. Speech advocating non-compliance with tax laws or (worse yet) tax fraud would be inappropriate for any employee of the Internal Revenue Service. And speech advocating non-compliance with the draft laws would be inappropriate for any employee of the Selective Service System. This Court, of course, has held that a state may not make it a crime for a person to enter a public building wearing a jacket that bears a message obscenely critical of the draft. *Cohen* v. *California*, 403 U.S. at 16. But the Court has never suggested that a draft board would be precluded from dis-

charging a person, whatever his position in the agency, who insisted on expressing himself in this way.

Public confidence in an agency's dedication to its mission, as well as the agency's need to foster proper attitudes among its workers, requires that no employee be excused from a *minimum* commitment to the agency's official responsibilities. That minimum commitment, we think, includes refraining from espousing actions that violate the laws the agency is assigned to enforce. This is not to say that the government might not find, in appropriate circumstances, that additional restrictions should be imposed on employees at higher levels. Such officials are more visible and may sometimes be required to make greater sacrifices in order to promote the reputation of the agency that employs them. Financial disclosure laws are an obvious example of this precept. But the fact that more is demanded of some employees should not relieve any employee of the responsibility to abide by the agency's minimum standards of decorum and professionalism. In light of "the common-sense realization that government offices could not function if every employment decision became a constitutional matter" (*Connick* v. *Myers*, 461 U.S. at 143 (footnote omitted)), we believe that the proper task of the courts is not to determine *which* employees should be bound by a restraint on expressive activity, but rather to determine *whether* the restraint is itself justifiable. As we have explained, a prohibition against espousing violations of the law that the agency is charged with enforcing is clearly justifiable under the First Amendment.

In any event, even if an agency is not entitled to set minimum standards of behavior for all of its employees, petitioner should nevertheless be entitled to discharge respondent for behavior that the court of appeals agreed would warrant the discharge of a law enforcement officer

possessing greater "discretion or power" (Pet. App. 42a). Respondent's role in the Constable's office was, at bottom, the same as the role of every other Deputy Constable: to assist petitioner in discharging his duties as Constable of Harris County in any lawful manner. Petitioner had authorized respondent to act in his "place and stead, to do and perform any and all acts and things pertaining to the office of said Constable" (*id.* at 5a). Her "comments and actions during work hours [are ones that] he would be deemed to have ratified" (*id.* at 10a). Thus, she should be held to the same standards as the highest-level employee in the agency—the Constable himself.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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